Supreme Court, U.S.
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No. 96-___

In The

Supreme Court of the United States

October Term, 1995

KOCH FUELS, INC.,

Petitioner,

v.

R. GARY CLARK, in his capacity as Tax Administrator for the State of Rhode Island,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Rhode Island

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. CERAMELLA
(Counsel of Record)
KOCH INDUSTRIES, INC.
P.O. Box 2256
Wichita, Kansas 67201
(316) 828-8385

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 PP

QUESTION PRESENTED

Did the Rhode Island Supreme Court run afoul of this Court's bright-line, physical-presence test in affirming application of a state sales tax to an out-of-state seller of fuel oil against a Commerce Clause challenge to the tax because the seller, which had no physical presence in Rhode Island, was deemed to have a "practical" presence in the state?

RULE 29.6 DISCLOSURE

Petitioner, Koch Fuels, Inc., was a wholly-owned subsidiary of Koch Refining Company during the relevant time period. On December 31, 1995, Koch Fuels, Inc. merged into Koch Refining Company, L.P. As of December 31, 1995, Koch Fuels, Inc. had no nonwholly owned subsidiaries. Koch Refining Company, L.P., currently has the following nonwholly owned subsidiaries: Koch Exploration Canada, Ltd. and Bow River Pipe Lines, Ltd.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Koch Fuels, Inc. ("Koch"), respectfully petitions for a writ of certiorari to review the decision of the Supreme Court of Rhode Island affirming judgment in favor of the Respondent, R. Gary Clark, which judgment imposed a gross earnings tax on sales of fuel oil by Koch despite the fact that Koch had no physical presence in Rhode Island.

OPINIONS BELOW

The Final Decision and Order of the Rhode Island Tax Administrator is dated April 11, 1989 and adopts and incorporates the Recommendation of the Hearing Officer dated April 7, 1989, which affirmed the assessment of the gross earnings sales tax upon Koch for certain fuel oil sales into Rhode Island. Neither the Final Decision nor the Recommendation are officially reported. They are reprinted at Pet. App. 1-8. The Judgment and Decision of the Rhode Island District Court, Sixth Division were entered December 7, 1993. The Judgment affirmed the order of the Tax Administrator. The Judgment and Decision of the District Court are not officially reported but are reprinted at Pet. App. 9-17. The May 23, 1996 decision of the Supreme Court of Rhode Island, affirming the Judgment of the District Court, is officially reported as *Koch Fuels, Inc. v. Clark*, 676 A.2d 330 (R.I. 1996). It is reprinted at Pet. App. 18-30.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Rhode Island on May 23, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a), as the validity of a state statute is drawn into question on the ground of being repugnant to the United States Constitution. This petition is timely filed pursuant to Supreme Court Rule 13.1.

PERTINENT PROVISIONS

The Commerce Clause of the United States Constitution, Art. I, § 8, cl. 3, provides that Congress shall have the power "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

Rhode Island's Gross Earnings Tax, during the relevant time period, provided in pertinent part at R.I.G.L. § 44-41-1:

> (a) A petroleum company shall pay an annual tax at the rate of one percent (1%) of the gross earnings in such calendar year derived by such company from sales of its products in this state. . . . Each company shall, on or before the fifteenth day of March of each year, render to the tax administrator under oath . . . a return on forms prescribed or furnished by the tax administrator, including in respect to such company the amount of gross earnings from sales of its products within this state for the year ending with the last day of the preceding year. The tax

> imposed under this act shall be in addition to any other tax imposed by Rhode Island with respect to which such company is liable.
>
> (b) For purposes of this chapter, "gross earnings" are those earnings from sales of its tangible personal property (inventory sold in the ordinary course of business) where shipments are made to points within the state. . . . "Gross earnings" does not include those earnings from sales to out-of-state customers for marketing, distribution or consumption outside this state. . . .

The tax was repealed on June 25, 1985, the repeal taking effect on January 1, 1986. P.L. 1985, Ch. 181, Art. 25 §§ 1 and 3.

STATEMENT OF THE CASE

This case presents a constitutional challenge to the assessment of sales taxes against Koch by the Rhode Island Tax Administrator under Rhode Island's Gross Earnings Tax. Specifically, Koch challenges the assessment as violative of the Commerce Clause of the United States Constitution because Koch has no physical presence in Rhode Island. Rather, Koch made five sporadic sales of fuel oil into Rhode Island between the years 1982 and 1984, which sales were negotiated by telecommunications not involving any representatives in Rhode Island and were completed by common carrier delivery. In short, Koch was a "seller whose only connection with customers in the State is by common carrier or the United States mail." *Quill Corp. v. North Dakota*, 504 U.S. 298, 301

(1992) (quoting *National Bellas Hess v. Department of Revenue*, 386 U.S. 753, 758 (1967)). As such, Rhode Island may not impose a sales tax upon Koch without unduly burdening interstate commerce and thus violating Art. I, § 8, cl. 3 of the United States Constitution.

I. Factual Background

For purposes of this petition, Koch will accept the Rhode Island Supreme Court's recitation of the factual setting:

> The facts of this case are not in dispute. Koch is a Delaware corporation with headquarters in Wichita, Kansas; it is engaged in the sale and distribution of fuel oil. On several occasions between the years 1982 and 1984, Koch sold fuel oil to New England Power to be used for the generation of electricity at Narragansett [Electric Company's] electric generating plant in Providence, Rhode Island. These occasions were the only instances in which Koch had any business contact with any entity in Rhode Island. The fuel oil sold to Narragansett originated in Texas, Pennsylvania, or Massachusetts. All shipments were delivered via common carriers using barges or vessels to bring the oil through Narragansett Bay to the Port of Providence.
>
> The terms of each of the sales contracts were negotiated and agreed upon via telecommunications between Koch's representatives in Texas or in New Jersey and New England Power's representatives in Westborough, Massachusetts. Narragansett received invoices for and paid the purchase price of the fuel oil outside Rhode Island. The terms of each of the sales

> contracts were f.o.b. Providence, indicating that title, possession, and risk of loss surrounding the fuel-oil shipments passed from Koch to Narragansett at the flange, namely, the point where the vessel's oil outflow pipe interlocks the oil terminal's inflow pipe in Rhode Island.

676 A.2d at 332, Pet. App. at 18-19.

In addition, it is undisputed that during the relevant time period, Koch owned no property or other assets in Rhode Island; leased no property or facilities in Rhode Island; had no employees or independent contractors in Rhode Island; had no retail, wholesale or administrative offices in Rhode Island; did not solicit business either by mail or phone; and, with the exception of the five oil sales at issue, had no other business dealings with Rhode Island. *Id.*; Administrative Findings of Fact Nos. 12-14, Pet. App. at 4.

II. Procedural Background

Koch was the subject of an audit of a petroleum company after an agent from the Division of Taxation noticed that Koch was the seller of fuel oil into Rhode Island. Administrative Findings of Fact Nos. 1-2, Pet. App. at 3. On March 11, 1988 the Division of Taxation issued a deficiency notice for $311,358.57 under the Gross Earnings Tax Act, R.I.G.L. § 44-41-1, for five sales of fuel oil by Koch into Rhode Island. 676 A.2d at 332, Pet. App. at 19-20; Administrative Findings of Fact Nos. 7 and 9, Pet. App. at 3. Koch made a timely request for an administrative hearing, which was held on August 26, 1988. The Recommendation of the Hearing Officer was issued on April 7, 1989, Pet. App. at 8, and the Final Decision and

Order of the Tax Administrator was issued four days later on April 11, 1989, Pet. App. at 1. Koch thereafter paid the Tax Division $366,604.88, representing the full assessment, plus statutory interest. District Court Stipulation No. 8, Pet. App. at 12.

On May 9, 1989 Koch filed a Complaint with Sixth Division District Court, seeking *de novo* review of the Final Decision and Order of the Tax Administrator. 676 A.2d at 332, Pet. App. at 20. As part of that appeal, Koch contended that application of the Gross Earnings Tax to the five transactions "violated both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution." District Court decision at 4, Pet. App. at 12. The District Court rendered its Judgment and Decision on December 7, 1993, affirming the Tax Administrator's Final Decision and Order and rejecting Koch's constitutional challenges to the sales tax. 676 A.2d at 332, Pet. App. at 20.

Koch's December 23, 1993 writ for certiorari to the Rhode Island Supreme Court was granted on September 8, 1994. Koch limited its constitutional challenge to one under the Commerce Clause. 676 A.2d at 332-33, Pet. App. at 21. The Rhode Island Supreme Court affirmed the Judgment of the District Court by decision dated May 23, 1996. This petition followed.

REASONS FOR GRANTING THE WRIT

Four years ago in *Quill Corporation*, the state of North Dakota asked this Court to renounce the bright-line, physical-presence test established in 1967 for analyzing the nexus requirement of the Commerce Clause for permissible state taxation of non-resident businesses engaged in interstate commerce. *See Quill Corp.*, 504 U.S. at 311; *see also Bellas Hess*, 386 U.S. at 758. In declining the invitation, this Court concluded:

> In sum, although in our cases subsequent to Bellas Hess and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that Bellas Hess established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of stare decisis indicate that the Bellas Hess rule remains good law. For these reasons, we disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of Bellas Hess.

504 U.S. at 317.

Despite this Court's recent reaffirmation of the bright-line, physical-presence requirement, the Rhode Island Supreme Court has ruled in these proceedings that Rhode Island could impose a sales tax upon Koch, who does not have a physical presence in the state, because Koch's shipping methods "created in practical effect a physical presence within this state." 676 A.2d at 334, Pet. App. at 24. The Rhode Island Supreme Court's analysis is directly contrary to the purpose of establishing a bright-

line rule in that it proposes a vague and nebulous "practically" physically present standard and, as such, seeks to do what Rhode Island cannot – namely circumvent the holdings in *Bellas Hess* and *Quill Corporation*.

This Court should grant the writ to clarify that its recent reaffirmation of the *Bellas Hess* bright-line rule in *Quill Corporation* was not an invitation for states to devise a blurry-line rule that "practical" presence is sufficient to establish nexus for Commerce Clause purposes.

I. Conflict with Relevant Decisions of this Court

Although the Commerce Clause, Art. I, § 8, cl. 3 of the United States Constitution, provides an affirmative grant of power to Congress, this Court has long recognized a "negative" or "dormant" provision of the Commerce Clause which limits the power of the States to "retard, burden or constrict" interstate commerce. *See D.H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 29 (1988); *see also, Quill Corp.*, 504 U.S. at 309. This Court has recognized that state taxation of businesses for the privilege of conducting business in that state is a "perennial problem," the problem at issue in this petition. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); *see also, Quill Corp.*, 504 U.S. at 309.

In *Complete Auto*, this Court reviewed over thirty years of jurisprudence concerning the constitutional limitations placed upon the state's taxing powers by the "dormant" Commerce Clause. *Complete Auto*, 430 U.S. at 279-87. As a result of that review, the Court abandoned much of the formalism that had preoccupied the issue

and instead articulated a more practical four-part test to review the constitutionality of a state's tax upon business conducted in that state. The tax can withstand scrutiny "against a Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." 430 U.S. at 279, 287; *see also Quill Corp.*, 504 U.S. at 311.

In *Quill Corporation*, this Court considered whether its 1967 holding in *Bellas Hess* had survived in light of the 1977 decision in *Complete Auto*. In *Bellas Hess* this Court reviewed both a Due Process and Commerce Clause challenge to an Illinois statute which required that a business located outside of Illinois (in Missouri) must collect and pay a use tax on any goods sold for use in Illinois. The out-of-state business, however, did not maintain any office, employees, salesmen, property or other assets in Illinois. It did not advertise in Illinois and had no phone listing there. 386 U.S. at 754. In holding that application of the Illinois use tax to the out-of-state business violated both the Due Process and Commerce Clauses, the *Bellas Hess* Court drew a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Id.* at 758.

In *Quill Corporation*, revisiting the *Bellas Hess* holding, this Court noted that *Bellas Hess* concerned the first prong of the *Complete Auto* four-part test under the Commerce

Clause, namely that of substantial nexus. 504 U.S. at 311.[1] For a variety of reasons, including the importance of *stare decisis*, the benefits of enforcing and maintaining a clear rule and the preservation of settled expectations, *id.* at 314-16, the majority in *Quill Corporation* held that for purposes of the first prong of the *Complete Auto* test, no "sufficient nexus" could be established over businesses "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." *Id.* at 315 (quoting *Bellas Hess*, 386 U.S. at 758).[2] Despite the invitation to do so, this Court did not abandon or in any way dilute the "bright-line physical presence requirement" for establishing the "substantial nexus" prong of the *Complete Auto* test. 504 U.S. at 317.

The Commerce Clause challenge which Koch made to the application of Rhode Island's Gross Earnings Tax to Koch's sales into Rhode Island is controlled by *Bellas Hess*

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[1] Before addressing the Commerce Clause challenge, the *Quill Corporation* Court had held that, due to developments in the law, the Due Process Clause no longer "required physical presence in a State for the imposition of duty to collect a use tax." 504 U.S. at 308. To that extent, *Bellas Hess* has been overruled in favor of a less stringent nexus test for Due Process purposes. Given this Court's relaxation of the Due Process limitations on a state's taxing power, the Petitioner did not pursue a Due Process challenge before the Rhode Island Supreme Court and does not pursue one by this petition.

[2] Three Justices agreed that the Commerce Clause holding of *Bellas Hess* should not be overruled but limited their justification to *stare decisis* grounds only. 504 U.S. at 319-21. Justice White dissented from that part of the decision in *Quill Corporation* which upheld the Commerce Clause aspect of *Bellas Hess*. *Id.* at 318.

and *Quill Corporation*. Given the following undisputed facts, plainly recognized by the Rhode Island Supreme Court, Koch fell within the "safe harbor" from Rhode Island taxation since Koch's only connection with the customer in Rhode Island was through common carrier.

1. Koch had no business office in Rhode Island.

2. Koch did not rent, lease or own real or personal property in Rhode Island.

3. Koch had no employees in Rhode Island.

4. Koch did not solicit, by telephone or otherwise, business in Rhode Island.

5. The *only* instances where Koch had any business contact with any entity in Rhode Island were the occasions where it sold fuel oil into Rhode Island (five occasions between 1982 and 1984).

6. Those transactions were negotiated by telephone calls, none of which was either to or from a person in Rhode Island.

7. The fuel oil originated outside of Rhode Island.

8. Invoices for the fuel oil were sent and received and payments were made and collected, all outside of Rhode Island.

9. All shipments were delivered via common carrier vessels.

10. The fuel oil passed in title from Koch at the point where the barge's flow pipe touched the terminal flow pipe in the Port of Providence, Rhode Island.

> 11. The tax imposed upon Koch under the Gross Earnings Tax was a sales or use tax.[3]

Since Koch's only contact with Rhode Island was by delivery of its product by common carrier, the instant case is indistinguishable for Commerce Clause purposes from *Bellas Hess* and *Quill Corporation*, and application of the Gross Earnings Tax to Koch should have been found to violate the Commerce Clause.

Instead, the Rhode Island Supreme Court departed from the bright-line test firmly in place and embarked upon what can only be described as a metaphysical presence test. The entirety of the Rhode Island Supreme Court's analysis on this point is as follows:

> We first note that Koch shipped approximately 25.6 million gallons of oil into Rhode Island over the course of three years with a total value of approximately $18 million. It retained total control over the shipments of oil throughout delivery. Koch retained title, possession, and risk of loss over the oil up until the point it reached the flange in Providence. Koch was in continuous contact and control with both the common carrier and Narragansett and was in a position to cancel the delivery if contract performance was not met by Narragansett. Although Koch did not own the vessels that carried its fuel oil into Rhode Island, Koch's fuel oil represented the entire and exclusive cargo of the vessel. On the basis of Koch's complete control over the oil shipments, the exclusive nature of the common

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[3] 676 A.2d at 333, Pet. App. at 21-22. Both *Bellas Hess* and *Quill Corporation* were decided in the context of a sales or use tax.

> carrier's contract, the unique nature of the cargo, and the fact that the sales were consummated upon delivery in Rhode Island, we are of the opinion that Koch's activities created *in practical effect* a physical presence within this state.

676 A.2d at 334, Pet. App. at 23-24 (emphasis added).

None of these points, whether taken individually, collectively or in any other combination, is sufficient to establish a bright-line physical presence. First, the dollar amount of sales or the number of sales in a state does not affect the physical presence analysis. For example, Quill Corporation had annual sales of approximately $1,000,000 to approximately 3,000 customers in North Dakota. 504 U.S. at 301. Retention of title and risk over the fuel during transport are typical common carriage terms and, in any event, do not implicate any substantial nexus with Rhode Island. This is especially true in this case where the common carriage admittedly did not even penetrate Rhode Island, but went merely to its border. Similarly, Koch's ability to "cancel" the delivery is no different than any C.O.D. delivery term by a mail order house. In the event of non-payment or non-delivery, the commodity is returned to the shipper. Again, how this point supports a physical presence in Rhode Island is not explained and is contradicted by this Court's holdings that use of common carriers (who may or may not deliver C.O.D.) do not transform such sellers into the same category as "sellers with retail outlets, solicitors, or property within a State." *Bellas Hess*, 386 U.S. at 758. Finally, the Rhode Island Supreme Court's observation that Koch's fuel oil happened to be the only cargo on the voyages in question does not diminish the fact that the vessels remained

common carriers, with all that term connotes, including open-access rules and application of tariff rates and schedules. The fortuity that no other shippers consigned any commodity to the carrier cannot be, and is not, of any constitutional significance.[4]

The decision of the Rhode Island Supreme Court not only conflicts directly with this Court's mandated application of a bright-line test for nexus under the Commerce Clause, but also represents an invitation for all states, localities and other taxing entities to deviate from the physically present test mandated by this Court and to devise a "practically" physically present test. This, of course, defeats the very purpose of establishing and maintaining a bright-line test, namely setting boundaries and settling expectations. This Court must now intervene to protect the integrity of the bright-line test before it degenerates into a line-shifting free for all.

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[4] Also of no constitutional significance are the record facts that Koch had registered to do business in Rhode Island and had filed Rhode Island tax returns from 1982-1984. 676 A.2d at 332, Pet. App. at 19; District Court Decision at 3, Pet. App. at 12. Koch established in the record that these filings were in error. *See, e.g.*, District Court Opinion at 8, Pet. App. at 16. In any event, the record is clear that the only business transactions Koch had involving Rhode Island were the fuel oil sales to which the sales tax was applied. 676 A.2d at 332, Pet. App. at 19. The erroneous filings with the state do not alter the substantive fact that Koch's only connection with Rhode Island was the five fuel oil sales delivered by common carrier.

II. Conflict with Decisions of Other State Courts

The Rhode Island Supreme Court's decision conflicts directly not only with precedent from this Court, but also with the following state court decisions, post *Quill Corporation*, which have properly followed this Court's precedent. *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693, 696-97 (Ohio 1995) ("Folio, however, has no physical presence in Ohio . . . to impute nexus to Folio because a sister corporation has a physical presence in Ohio runs counter to federal constitutional law"); *Pledger v. Troll Book Clubs, Inc.*, 871 S.W.2d 389, 391 (Ark. 1994) ("for such a tax to be upheld under the dormant Commerce Clause, the entity taxed must maintain a physical presence in the taxing state"); *Bloomingdale's By Mail, Ltd. v. Huddleston*, 848 S.W.2d 52, 57 (Tenn. 1992) (the statute "is in violation of the Commerce Clause of the United States Constitution. Plaintiff-Appellant's Commerce Clause rights were violated by the Commissioner of Revenue's unconstitutional imposition of a duty on the Plaintiff to . . . collect use tax on its mail order sales"), *cert. denied*, 509 U.S. 907 (1993); *Florida Dept. of Revenue v. Share Int'l*, 667 So.2d 226, 230 (Fla. Dist. Ct. App. 1995) ("the presence in the state for approximately three days each year of share employees and products . . . does not establish a substantial nexus"), *aff'd*, 1996 WL 399843 (Fla. 1996).

The Rhode Island decision also conflicts with at least one state court decision, pre-dating *Quill Corporation* but correctly applying *Bellas Hess'* substantial nexus analysis. *See Burke & Sons Oil Co. v. Director of Revenue*, 757 S.W.2d 278, 281 (Mo. Ct. App. 1988) ("Burke & Sons' five to seven mile trips into Missouri to supply one customer

does not constitute an 'invasion or exploitation of the consumer market' in Missouri and could not create a sufficient nexus to impose use tax collection").

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. CERAMELLA
(Counsel of Record)
KOCH INDUSTRIES, INC.
P.O. Box 2256
Wichita, Kansas 67201
(316) 828-8385

Attorney for Petitioner

APPENDIX 1

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS
DIVISION OF TAXATION

ADMINISTRATIVE HEARING

KOCH INDUSTRIES, INC.

FINAL DECISION AND ORDER

TAX ADMINISTRATOR'S FINAL
DECISION AND ORDER

I have read the record of the within case and I approve, adopt and incorporate herein the findings of fact and conclusions of law as made by the hearing officer, Sandra J. Murphy.

It is my decision and order that the assessment is affirmed.

/s/ R. Gary Clark
R. Gary Clark
Tax Administrator

April 11, 1989

In Re: Koch Industries, Inc.
Gross Earnings Tax
Of Petroleum Companies
January 1982 – December 1984

JURISDICTION

Pursuant to Chapter 35 of Title 42 of the General Laws of Rhode Island of 1956, as amended, and the Rules of Practice and Procedure, an administrative hearing was

held on Friday, August 26, 1988, in the conference room at the State House, Providence, Rhode Island.

The hearing was held in accordance with the request submitted in the letter dated March 14, 1988.

The main purpose of the hearing was to allow the taxpayer to present evidence and arguments that they have no nexus in Rhode Island and, therefore, tax is discriminatory to them.

Taxpayer was represented by Kelly Sears, Esq. The Division of Taxation was represented by Bernard J. Lemos, Esq.

RECORD OF THE CASE

Request for Hearing, Notice of Hearing, Appointment of Hearing Officer, Entries of Appearance, Tax Administrator's Exhibits A-I, Taxpayer's Exhibits 1-9, Stenographic Transcript, Taxpayer's Memoranda of Law, Memorandum of Law of the Division of Taxation.

STATUTES AT ISSUE

At issue are the following sections of the General Laws of Rhode Island of 1956, as amended: 44-41-1, and the Regulations and Rules issued by the Tax Administrator.

MATTERS OFFICIALLY NOTICED

Administrative Appeal No. 83-206, November 2, 1987, *George E. Warren Corp. v. John H. Norberg, Tax Administrator*. Administrative Decision No. 86-61.

FINDINGS OF FACT

1. Koch Fuels, Inc. was the subject of a routine field audit of a petroleum company.

2. The audit was initiated when an agent from the Division of Taxation discovered that Koch Fuels had sold to New England Power Company a quantity of number 6 oil.

3. The oil was shipped to Providence by vessel F.O.B. Providence.

4. The measure of tax for the sale of fuel was $24,509,909.41.

5. The measure of tax was later revised to $18,222,909.41.

6. The measure was reduced because one of the sales was made by another oil company, Scan Oil Company.

7. A notice of deficiency determination under the gross earnings tax of a petroleum company was issued to the taxpayer in the following amounts:

Tax	Interest	Penalty	Total
$182,229.09	$83,572.21	$45,557.27	$311,358.57

8. Taxpayer filed business corporation taxes in Rhode Island for the years 1982, 1983, and 1984.

9. At the time of sale in the five transactions in question, taxpayer owned the oil just prior to delivery to Narragansett Electric.

10. Title to the petroleum product passed to Narragansett "at the flange" or at the point where two pipes connected on shore.

11. Taxpayer invoiced Narragansett for the oil and was paid by them for the oil.

12. Koch Fuels does not have an office in Rhode Island.

13. Koch Fuels does not have any employees in Rhode Island.

14. Koch Fuels does not own or lease any property in Rhode Island.

CONTENTIONS OF THE TAXPAYER

Taxpayer contends that all of the circumstances leading up to the five sales to Narragansett occurred outside the state of Rhode Island. Since the only thing that occurred in Rhode Island was the barge and ship coming into the harbor and discharging the oil, the taxpayer contends that the state of Rhode Island has not sufficient nexus to tax Koch Fuels for the sales to Narragansett.

Taxpayer further contends that it is not an importer of oil into Rhode Island, but that Narragansett Electric is the importer because it is the one that is bringing the fuel oil into Rhode Island for its use.

CONCLUSIONS OF LAW

The taxpayer has first of all challenged the constitutionality of the tax. The general rule in Rhode Island is that the legislature is presumed to act in accordance with

existing constitutional mandates, *Opinion to the Governor*, 89 R.I. 329, 152 A.2d 158, *Boucher v. Sayeed*, ___ R.I. ___, 459 A.2d 1056.

In the case of *State v. Lerner*, 1012 R.I. 62, 308, A.2d 324, the court said:

> Finally, it is well settled that state legislatures are presumed to have acted within their constitutional powers despite the fact that in practice their laws may result in some inequality. The burden of establishing the unconstitutionality of a statute rests on him who asserts it, and courts may not declare a legislative enactment invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon some rational basis within the knowledge and experience of the legislature.

The taxpayer has not shown that the imposition of a gross earnings tax upon importers of petroleum does not have a rational basis. Although no other business was conducted in Rhode Island by the taxpayer, it did make *sales* in Rhode Island of petroleum that it *caused to be imported into Rhode Island*. The statute does not attempt to reach any other receipts, only those directly stemming from business conducted within Rhode Island. So the tax is fairly designed to reach only in state activities. See *McGoldrick v. Berwind White*, 309 US 33, 60 S.Ct 388, 84 L.Ed 565. Taxpayer cites *General Motors Corporation v. Washington, et al* 377 US 436, 84 S.Ct. 1564, 12 L.Ed. 2d 430. In that case the supreme court of the United States clearly holds as proper a tax on a nonresident corporation's business activities conducted within the state.

In Rhode Island, doing business clearly includes making sales within the state (§ 44-11-14). *General Motors, supra,* specifically holds that "an instate activity may be a sufficient local incident upon which a tax may be based" id @ 447.

The tax protested is that assessed under § 44-41-1 of the Rhode Island General Laws of 1956, as amended. The pertinent sections of the law read as follows:

> 44-41-1. *Levy and rate of tax – Definitions. [Repealed effective January 1, 1986.]* – (a) A petroleum company shall pay an annual tax at the rate of one percent (1%) of gross earnings in such calendar year derived by such company from the sale of petroleum products in this state . . .
>
> (b) For purposes of this chapter "gross earnings" are those earnings from sales of its tangible personal property (inventory sold in ordinary course of business) where shipments are made to points within the state, and those earnings from such sales made by any entity in which any such petroleum company owns not less than a twenty-five percent (25%) interest in such entity.
>
> . . .
>
> The term "petroleum company" means every corporation formed for or engaged in the business of importing or causing to be imported by a person other than a corporation subject to tax under this section into this state for sale in this state, extracting, producing, refining, manufacturing or compounding petroleum . . .

> However, to prevent the multiple application of the tax imposed by this chapter, gross earnings shall not include the earnings from any sale for resale to a purchaser which is a petroleum company subject to tax under this chapter. It shall be presumed that no earnings are earnings from a sale for resale to such purchaser unless such purchaser furnishes the petroleum company with a resale certificate in such form and under such terms and conditions as the tax administrator may prescribe and such certificate is accepted in good faith by the petroleum company.
>
> * * *

Taxpayer claims that it is not an oil company subject to the tax, but the statutory requirements are clear. Taxpayer is a *corporation which has caused to be imported into Rhode Island a petroleum product for sale in this state.*

The taxpayer cites *Complete Auto Transit v. Brady,* 430 U.S. 274 (1977), and argues that the tax does not satisfy the four-pronged test. (a) There must be a substantial nexus between the taxpayer and the state which is attempting to pose the tax; (b) the service provided to the taxpayer by the state must be fairly related to the tax; (c) the tax must not discriminate against interstate commerce; (d) the tax must be fairly apportioned.

The taxpayer indicated an intent to do business in Rhode Island by filing state income tax returns regularly and registering to do business in Rhode Island. So there was a physical presence in Rhode Island sufficient to cause a nexus subjecting it to Rhode Island Law (See *National Geographic Society v. California Equalization Board,* 430 U.S. 551). The taxpayer utilized the shipping lanes

and docks maintained by the state of Rhode Island which directly relates to the sale and delivery of fuel oil. The tax is applied fairly and evenly to *all* importers so there is no interstate commerce discrimination. And, finally, the tax is only applied to sales in Rhode Island, so there is no apportionment problem.

Finally, taxpayer cites *Burke and Sons Oil Co. v. Director of Revenue*, WD No. 39.774, a sales and use tax case as authority for its nexus position. In that case, apparently the Missouri Revenue Department attempted to press *USE TAX* collection responsibility upon a taxpayer with only minimum contact with the state. The instant tax is applied to importers of petroleum product and was not triggered until an "importation" occurred. The statute does not presume to assert control over any other activity of an out of state company; only that activity directly related to business transacted within the borders of Rhode Island.

RECOMMENDATION

In accordance with the foregoing, it is the recommendation of the Hearing Officer that the assessment be affirmed.

/s/ Sandra J. Murphy
Sandra J. Murphy, Esq.
Hearing Officer

April 7, 1989

APPENDIX 2

STATE OF RHODE ISLAND
PROVIDENCE, Sc.

DISTRICT COURT
SIXTH DISTRICT

KOCH FUELS INC.

vs.

A.A. No. 89-174
(Filed Dec. 1, 1993)

R. GARY CLARK
TAX ADMINISTRATOR

JUDGMENT

This cause came on before Higgins, J. on Administrative Appeal, and upon review of the record and memoranda of counsel, and a decision having been rendered, it is

ORDERED AND ADJUDGED

The Tax Administrator's assessment is affirmed.

Dated at Providence, Rhode Island this 7th day of December, 1993.

BY ORDER:

/s/ _____
CHIEF CLERK

ENTER:

/s/ _____

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. DISTRICT COURT
SIXTH DIVISION

KOCH FUELS INC.	:	
V.	:	
	:	
R. GARY CLARK	:	A.A. 89-174
TAX ADMINISTRATOR	:	

DECISION

HIGGINS, J. This matter is before the Court on plaintiff Koch Fuels Inc.'s appeal from the Tax Administrator's assessment and imposition of a tax pursuant to the Petroleum Companies Gross Earnings Tax Act. The authority of the District Court to hear this appeal is controlled by G.L. 1956 (1988 Reenactment) § 8-8-24 which provides in pertinent part:

> Each appeal of a final decision of the tax administrator concerning an assessment deficiency or otherwise shall be an original independent proceeding in the nature of a suit in equity to set aside such final decision and shall be tried de novo and without a jury . . .

The parties stipulated to the following:

"1. Plaintiff, Koch Fuels, Inc. (Koch or Taxpayer), is a Delaware corporation with its principal place of business located in Wichita, Kansas.

2. Defendant, R. Gary Clark, is Tax Administrator for the State of Rhode Island and head of the Rhode Island Division of Taxation (Tax Division).

3. As a result of examination under the Petroleum Companies Gross Earnings Tax, R.I.G.L. Section 44-41-1 *et seq.*, the Tax Division issued the Taxpayer a Notice of Deficiency Determination (Notice) dated March 11, 1988 seeking $311,358.57 in tax, interest and penalty for the period January 1, 1982 through December 31, 1984.

4. On March 14, 1988, the Taxpayer made a timely request for administrative review of said Notice pursuant to R.I.G.L. Section 44-41-9.

5. On May 24, 1988, an informal preliminary conference regarding said Notice was conducted by a lay conferee at the Tax Division in Providence, Rhode Island. The matter was unresolved after said conference and was forwarded for full administrative hearing before the Office of Legal Services and Adjudication.

6. On August 26, 1988, a formal recorded administrative hearing was held pursuant to Chapter 35 of Title 42 of the General Laws, as amended before Sandra J. Murphy, Esq., Hearing Officer, at Room 149 of the State House in Providence, Rhode Island. Both parties appeared by way of legal counsel who presented exhibits, testimony and legal argument in support of their respective positions.

7. On April 7, 1989, the Hearing Officer recommended that the assessment be affirmed. The Tax Administrator incorporated and adopted said recommendation

and issued a Final Decision and Order dated April 11, 1989 whereby he affirmed the assessment.

8. The Taxpayer was apprised of said Final Decision and Order in a Notice dated April 11, 1989. On May 8, 1989, the Taxpayer paid the Tax Division $336,604.88 representing the amount of the contested assessment plus statutory interest accrued thereon.

9. On or about May 9, 1989, the Taxpayer filed a complaint with the Sixth Division District Court seeking *de novo* review of said Final Decision and Order pursuant to R.I.G.L. Sections 8-8-24 *et seq.*

10. On May 25, 1989, the Tax Administrator filed an Answer to the Taxpayer's Complaint . . . "

Briefly, a summary of the pertinent facts are as follows. Koch Fuels Inc. delivered fuel oil via common carrier to Narragansett Electric Company's oil pipe in Providence, Rhode Island on several occasions between 1982 and 1984. All of the deliveries were negotiated outside Rhode Island. Koch filed Rhode Island corporate tax returns from 1982 through 1984 and registered to do business in Rhode Island.

In its appeal, Koch Fuels argues that the application of the Gross Earnings Tax, G.L. § 44-41-1 *et seq.*, G.L. 1982, Ch. 9, Art. 6, 1 (repealed 1985) to the instant transaction violated both the Due Process Clause of the Fourteenth Amendment and the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution. Further, Koch Fuels contends that they did not cause the fuel to be imported to Rhode Island and as a result they were not

an importer as defined under the Gross Earnings Tax statute.

Koch first argues that the delivery of fuel to Narragansett by common carrier is an insufficient contact under the Due Process Clause to subject a company to the Gross Earnings Tax.

The first part of the two pronged test to determine the constitutionality of a state tax statute under the Due Process Clause was enunciated in *National Bellas Hess Inc. v. Department of Revenue,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967). In *National Bellas Hess* the U.S. Supreme Court stated that a tax may be imposed where a nexus exists between the activity to be taxed and the state, 386 U.S. at 753, 87 S.Ct. at 1391, 18 L.Ed.2d at 506. Secondly, the tax imposed must be reasonably related to the amount of activity that occurred within the taxing state. *Norfolk & Western Railway Co. v. Missouri State Tax Comm'n,* 390 U.S. 317, 325, 88 S.Ct. 995, 1001, 19 L.Ed.2d 1201, 1207 (1968).

In its first argument, Koch Fuels contends that the nexus test established in *National Bellas Hess, supra,* has not been satisfied. In support of this argument, Koch asserts that it had no property, offices, or employees in Rhode Island. Further, plaintiff notes that all communications concerning the delivery of fuel oil occurred outside Rhode Island. In fact, Koch Fuels indicates that the transportation of its fuel oil via common carrier is the only contact it had with the State of Rhode Island.

The Tax Administrator asserts that because Koch retained title, possession and control over the fuel oil while en route to Narragansett, the tax satisfies the nexus

requirement. In support of this argument, the Tax Administrator cites several cases that purportedly expand the scope of *Bellas* including *Mobil Oil Co. v. Comm'r*, 445 U.S. 425, 100 S.Ct. 1223, 36 L.Ed.2d 510 (1980) and *Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue*, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987).

In the recent decision *Quill Corp. v. North Dakota, By and Through Heitkamp*, 504 U.S. at ___, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) the U.S. Supreme Court found that a North Dakota state use tax as applied to an out-of-state mail-order house did not violate the nexus test of the Due Process Clause. The *Quill* court based its decision on the application of Due Process principles outlined in *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Specifically, the *Quill* court reasoned that a tax is constitutional where a corporation has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." *Quill Corp.*, 504 U.S. at ___, 112 S.Ct. at 1911, 119 L.Ed.2d at 104 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 218, 97 S.Ct. 2569, 2587, 53 L.Ed.2d 683, 706 (1977). (Stevens, J. concurring in judgment.) One factor the court considered critical in finding that a use tax was proper was *Quill Corp.'s* numerous activities that were purposefully directed at the taxing state. *Quill Corp.*, 504 U.S. at ___, 112 S.Ct. at 1911, 119 L.Ed.2d at 104.

Applying the Due Process standard outlined above to the present case, it is fair to say that Koch should have been aware that the oil shipment would be subject to a use tax. The oil sales were consummated in Rhode Island. More importantly, however, Koch retained control of the

shipment until the oil was physically transferred to Narragansett's flange in Providence. This is unlike the typical common carrier situation where goods are placed in transit and the seller relinquishes control. Until the oil was physically delivered to the flange, Koch reserved the right to cancel the shipment should Narragansett have failed to either give adequate assurances of contract performance or establish a satisfactory credit line to pay for the oil.

Having found a sufficient nexus under the Due Process Clause, it must be determined if the tax imposed is reasonably related to the benefits conferred. Koch clearly received substantial benefits from the State of Rhode Island in this transaction. Koch took advantage of the piers and other facilities abutting the Rhode Island coastline. Also, Rhode Island would have been responsible for cleaning up any oil spill from the carrier. In short there were significant burdens imposed on the state from the shipment to justify the one percent use tax.

Koch asserts in its second argument that the tax statute as applied to the oil shipments violates the Commerce Clause. Specifically, Koch argues that the Gross Earnings Tax violates the four part test outlined in *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977). Pursuant to *Complete Auto*, a use tax survives a Commerce Clause attack when it "is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state." 430 U.S. at 279, 97 S.Ct. at 1079, L.Ed.2d at 331.

Koch first contends that the tax fails to satisfy the nexus standard established in *Complete Auto.* Relying on the contacts noted above in the Due Process analysis, this Court finds that Koch had sufficient contacts with Rhode Island to satisfy the "substantial nexus" requirement of the *Complete Auto Transit Inc.* test.

This Court also concludes that the tax was fairly apportioned. The tax was based solely on sales within the State of Rhode Island. Further, the few communications between the parties outside Rhode Island do not amount to an apportionment problem that violates the Commerce Clause. See *Goldberg v. Sweet*, 488 U.S. 252, 102 L.Ed.2d 607, 109 S.Ct. 582 (1989).

Thirdly, Koch has failed to demonstrate why the Gross Earning Tax discriminates against interstate commerce.

Lastly, the Court finds that the tax imposed on Koch is reasonably related to the services provided by the State of Rhode Island and thus does not violate the fourth prong of the *Complete Auto* test. Not only did the State of Rhode Island provide shipping facilities to Koch, but the state also maintained emergency equipment in case of an environmental disaster. Given these state provided services the imposition of a one percent tax was reasonable.

Having found that Koch's nexus with Rhode Island satisfies Due Process and Commerce Clause requirements, this Court need not address appellant's argument that the mistaken filing of income tax returns and registration of Koch Fuel Inc. in Rhode Island fail to establish an adequate nexus to impose the Gross Earnings Tax.

In its last argument on appeal, Koch Corporation claims that the Gross Earnings Tax is inapplicable to the oil shipments as Koch was not an importer and did not cause the importation of the fuel oil. Based on the contractual terms for delivery, this Court finds that Koch did cause fuel oil to be imported into Rhode Island. The contract terms required Koch to deliver the oil F.O.B. Providence. This clearly fixed Providence as the point where Koch had to ship the fuel. See R.I.G.L. 6A-2-401(2). Accordingly, Koch caused the oil to be imported into Rhode Island.

In conclusion, the Rhode Island Gross Earnings Tax as applied to the instant facts survives appellant's Due Process and Commerce Clause challenge. Koch's nexus with the State of Rhode Island rests on its control over the common carrier to the point of delivery as distinguished from the typical mail order house that deposits its products into the mails thereby relinquishing all control. Accordingly, the Tax Administrator's assessment is affirmed.

APPENDIX 3

May 23, 1996

Supreme Court

No. 93-714 M.P.
(AA 89-174)

Koch Fuels, Inc.

v.

R. Gary Clark, in His Capacity as Tax Administrator for the State of Rhode Island.

Present: Weisberger, C.J., Murray, Lederberg, and Bourcier, JJ.

OPINION

Murray, Justice. This case came before us on a petition for certiorari filed by Koch Fuels, Inc. (Koch), seeking a review of a judgment entered by the District Court. The District Court judgment sustained a final decision rendered by R. Gary Clark, the Tax Administrator of the State of Rhode Island (tax administrator), imposing a gross-earnings tax on sales of fuel oil by Koch to New England Power; New England Power is the parent company of Narragansett Electric Company (Narrangansett). After reviewing the record before us, we affirm the District Court's judgment.

The facts of this case are not in dispute. Koch is a Delaware corporation with headquarters in Wichita, Kansas; it is engaged in the sale and distribution of fuel oil. On several occasions between the years 1982 and 1984, Koch sold fuel oil to New England Power to be used for

the generation of electricity at Narragansett's electric generating plant in Providence, Rhode Island. These occasions were the only instances in which Koch had any business contact with any entity in Rhode Island. The fuel oil sold to Narragansett originated in Texas, Pennsylvania, or Massachusetts. All shipments were delivered via common carriers using barges or vessels to bring the oil through Narragansett Bay to the Port of Providence.

The terms of each of the sales contracts were negotiated and agreed upon via telecommunications between Koch's representatives in Texas or in New Jersey and New England Power's representatives in Westborough, Massachusetts. Narragansett received invoices for and paid the purchase price of the fuel oil outside Rhode Island. The terms of each of the sales contracts were f.o.b. Providence, indicating that title, possession, and risk of loss surrounding the fuel-oil shipments passed from Koch to Narragansett at the flange, namely, the point where the vessel's oil outflow pipe interlocks the oil terminal's inflow pipe in Rhode Island.

At all times relevant to the sales made to New England Power, Koch did not have employees in Rhode Island and did not rent, lease, or own real property within Rhode Island. Koch did, however, register to do business in Rhode Island and paid Rhode Island corporate taxes in the years it sold fuel oil to New England Power.

On March 11, 1988, the Rhode Island Division of Taxation (tax division) issued Koch a notice-of-deficiency determination regarding five of the six fuel-oil deliveries made by Koch to Narragansett under the Gross-Earnings

Tax Act, G.L. 1956 § 44-41-1, as amended by P.L. 1983, ch. 2, art. 4, § 1.[1] This deficiency amounted to $311,358.57 including penalties and interest.

On March 14, 1988 Koch made a timely request for an administrative hearing. The matter was heard at a formal administrative hearing on August 26, 1988. The tax administrator on the recommendation of the hearing officer issued a final order on April 7, 1989, affirming the tax assessment against Koch.

On May 8, 1989, Koch paid the tax division the full assessment of $366,604.88, which represents the amount of the contested assessment plus statutory interest accrued thereon. Subsequently, on May 9, 1989, Koch filed a complaint seeking de novo review of the tax division's decision in the District Court pursuant to G.L. 1956 § 8-8-24.

The District Court rendered its decision on December 7, 1993, affirming the tax administrator's assessment. In its decision the District Court found that the tax assessment at issue did not violate either the due-process clause of the Fourteenth Amendment or the Commerce Clause of Article I, section 8, clause 3, of the United States Constitution. It also found that Koch was an "importer" within the meaning of the Gross-Earnings Tax Act and was therefore correctly assessed pursuant to that act.

On December 23, 1993, Koch filed a petition for writ of certiorari in this court, seeking review of the District

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[1] That statute has since been repealed.

Court's judgment. We granted Koch's petition on September 8, 1994. On certiorari, Koch challenges the District Court's analysis based on the commerce clause and its determination that Koch was an "importer" within the meaning of the Gross-Earnings Tax Act. We shall therefore confine our consideration in similar fashion to the propriety of the District Court's analysis based on the commerce clause and its interpretation of the Rhode Island Gross-Earnings Tax Act.

As an initial matter we shall address whether the gross-earnings tax imposed upon Koch may be considered a "sales or use" tax. We note that the District Court, in its decision rendered on December 7, 1993, characterized the tax at issue as a sales or use tax. Upon review of the relevant statute, we are of the opinion that the District Court did not err in reaching such a result.

Section 44-41-1(a), entitled "Gross Earnings Tax of Petroleum Companies," imposes on petroleum companies "an annual tax rate of one percent (1%) of gross earnings * * * derived * * * from the *sale* of petroleum products in this state." (Emphasis added.) The term "gross earnings" is defined as "those earnings from *sales* of its tangible personal property (inventory sold in the ordinary course of business) where shipments are made to points within the state * * * [but] does not include those earnings from *sales* to out-of-state customers for marketing, distribution or consumption outside this state." (Emphasis added.) Section 44-41-1(b). It is clear that although the tax at issue is defined by the Legislature as a "gross earnings" tax, its application pursuant to the statute imposes a tax upon specific sales transactions in Rhode Island.

The tax mandated by the statute therefore has the practical effect of a sales or use tax. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326, 331 (1977) (the United States Supreme Court noted that when confronted with commerce-clause challenges of state taxes, it considered "not the formal language of the tax statute but rather its practical effect"). We are therefore of the opinion that the District Court correctly characterized the tax at issue as a sales or use tax.

We shall now turn to Koch's contention that the gross-earnings tax imposed by the relevant statute violates the commerce clause. The United States Supreme Court articulated a four-part test for determining the validity of a state tax under the commerce clause in *Complete Auto*. In that case, the Court provided that a state tax will pass commerce-clause scrutiny when the "tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279, 97 S. Ct. at 1079, 51 L. Ed. 2d at 331. In applying this four-pronged test to the instant case, we are not persuaded by Koch's contentions that the gross-earnings tax at issue was violative of the commerce clause.

In regard to the first prong of the test Koch argues that its fuel-oil sales in Rhode Island lacked the substantial nexus required in a commerce-clause analysis. Relying on *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904. 119 L. Ed. 2d 91 (1992), Koch contends that because the gross-earnings tax at issue is a sales or use tax, the first prong of the test is satisfied only if the taxpayer

maintained a physical presence in the taxing state. Koch argues that since it does not have a physical presence in Rhode Island, its activities lack a substantial nexus with Rhode Island. Although we do not dispute the applicability of *Quill Corp.* to the instant case, we are not persuaded by Koch's contentions that it did not maintain a physical presence in this state.

In *Quill Corp.* the Court considered the imposition of state use tax upon a mail-order vendor of office supplies under both the due process analysis and the commerce-clause analysis. In regard to the commerce-clause analysis, the Court upheld its holding in *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967), and determined that a state cannot constitutionally impose a sales and use tax upon a seller unless the seller maintained a physical presence in the taxing state. *Quill Corp.*, 504 U.S. at 314, 112 S. Ct. at 1914, 119 L. Ed. 2d at 108. In instances wherein a taxpayer did "no more than communicate with customers in the State by mail or common carrier as part of a general interstate business," the Court stressed that that taxpayer did not have a substantial nexus with the taxing state.

In the instant case we are of the opinion that Koch's activities amounted to more than mere "communication with its customers in the State by mail or common carrier." We first note that Koch shipped approximately 25.6 million gallons of oil into Rhode Island over the course of three years with a total value of approximately $18 million. It retained total control over the shipments of oil throughout delivery. Koch retained title, possession, and risk of loss over the oil up until the point it reached the

flange in Providence. Koch was in continuous contract and control with both the common carrier and Narragansett and was in a position to cancel the delivery if contract performance was not met by Narragansett. Although Koch did not own the vessels that carried its fuel oil into Rhode Island, Koch's fuel oil represented the entire and exclusive cargo of the vessel. On the basis of Koch's complete control over the oil shipments, the exclusive nature of the common carrier's contract, the unique nature of the cargo, and the fact that the sales were consummated upon delivery in Rhode Island, we are of the opinion that Koch's activities created in practical effect a physical presence within this state. Given Koch's physical presence in Rhode Island, we agree with the District Court's conclusion that Koch had sufficient contact with the state to satisfy the substantial-nexus requirement of the *Complete Auto* test.

Koch next asserts that the gross-earnings tax is unfairly apportioned, thereby violating the second prong of the *Complete Auto* test. The apportionment prong of the analysis serves to "prohibit taxes that pass an unfair share of the tax burden onto interstate commerce." *Quill Corp.*, 504 U.S. at 313, 112 S.Ct. at 1913, 119 L.Ed.2d at 107. In *Goldberg v. Sweet*, 488 U.S. 252, 261, 109 S.Ct. 582, 589, 102 L.Ed.2d 607, 616 (1989), the Court stated that "we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent." *See also Armco, Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540, 555-56 (1984); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169-70, 103 S.Ct. 2933, 2942-43, 77 L.Ed.2d 545, 556 (1983).

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, 488 U.S. at 261, 109 S.Ct. at 589, 102 L.Ed.2d at 617. "[T]he internal consistency test [therefore] focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute." *Id.* In the instant case the gross-earnings tax applies only to those fuel-oil sales consummated in Rhode Island. We are of the opinion that such a tax is internally consistent, for if every state taxed only those fuel-oil sales consummated in the state, only one state would be able to tax each sale. *See id.* (the tax at issue is internally consistent where only one state would be able to tax those interstate phone calls which are charged to an in-state service address).

We next turn to the external-consistency requirement. That requirement asks "whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262, 109 S.Ct. at 589, 102 L.Ed.2d at 617 (citing *Container, Corp.*, 463 U.S. at 169-70, 103 S.Ct. at 2942-43, 77 L.Ed.2d at 555-56). Here Koch argues that the gross-earnings tax is unfairly apportioned because it taxes the entire transaction without taking into account other activities associated with the transaction that occurred outside Rhode Island. We are not persuaded by Koch's contentions and are of the opinion that the gross-earnings tax at issue is externally consistent.

In the instant case the gross-earnings tax applies only to those sales that are consummated within Rhode Island. Although Koch maintains that its sales of petroleum oil

within this state were a result of numerous negotiations outside Rhode Island, the District Court found that "[such] communications between the parties outside Rhode Island do not amount to an apportionment problem that violates the Commerce Clause." We agree with the District Court. Although it appears that Koch would have this court apportion the sale on the basis of its contract negotiations outside Rhode Island, such an apportionment would be administratively unwieldy. We note that fair apportionment does not require a state to adopt a tax which would "pose genuine administrative burdens." *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 296, 107 S.Ct. 2829, 2847, 97 L.Ed.2d 226, 251 (1987). Accordingly, we are not persuaded by Koch's contentions. Because the gross-earnings tax is both externally and internally consistent, we are of the opinion that the gross-earnings tax is fairly apportioned.

We turn next to the third prong of the test, which prohibits a state from imposing a discriminatory tax on interstate commerce. Koch asserts that the gross-earnings tax discriminate against interstate commerce because it imposes a tax on income from interstate transactions only. Koch argues that the gross-earnings tax has a discriminatory effect on out-of-state petroleum companies because even though it taxes their sales coming into Rhode Island, Rhode Island petroleum companies are free to make sales out of state that are not subject to the gross-earnings tax.

We have held that the failure of a party challenging the constitutionality of a taxing statute to present evidence of its discriminatory effect is fatal to the claim of unconstitutionality. *Seibert v. Clark*, 619 A.2d 1108, 1116 (R.I. 1993). Here, the District Court found that Koch had

failed to demonstrate the discriminatory effect of the gross-earnings tax. The District Court specifically noted that Koch produced no evidence whatsoever to support its discrimination argument. On review of the record we also note the absence of any evidence to show that the gross-earnings tax discriminates against out-of-state petroleum companies in favor of Rhode Island petroleum companies. On this basis we must reject Koch's discriminatory-effect assertions.

We now reach the fourth prong of the test, namely, whether the tax at issue is fairly related to the presence and activities of the taxpayer within the state. Koch argues that the assessment from the gross-earnings tax is not fairly related to the services provided to Koch by Rhode Island. Koch asserts that because it has neither employees nor property within Rhode Island, it does not directly receive benefits related to the tax at issue. Koch further argues that because the fuel oil was shipped into Rhode Island on common carriers which it did not own, any state-financed benefits, such as the creation and the management of navigable waterways, benefited the common carrier only.

Like the substantial-nexus prong of the *Complete Auto* test, the reasonable-relation prong serves to "limit the reach of State taxing authority so as to ensure that State taxation does not unduly burden interstate commerce." *Quill Corp.*, 504 U.S. at 313, 112 S.Ct. at 1913, 119 L.Ed.2d at 107. This prong imposes the "additional limitation that the *measure* of the tax must be reasonably related to the extent of the contact, since it is the activities or presence of the taxpayer in the State that may properly be made to bear a 'just share of state tax burden.' " *Commonwealth*

Edison Co. v. Montana, 453 U.S. 609, 626, 101 S. Ct. 2946, 2958, 69 L. Ed. 2d 884, 900 (1981). Moreover, "[t]he tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. * * * On the contrary, 'interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct "benefit." ' " *Goldberg*, 488 U.S. at 267, 109 S.Ct. at 592, 102 L.Ed.2d at 620-21.

In the instant case Koch's assertions that it is not the beneficiary of services provided by Rhode Island is untenable. We are persuaded by the District Court's findings that the tax imposed on Koch is reasonably related to the services provided by Rhode Island. As the District correctly indicated, Rhode Island provided shipping facilities to Koch and maintained emergency equipment in case of an environmental disaster. The risk of an environmental disaster, and its attendant costs, are based upon the amount of oil imported into and sold in Rhode Island. We note that Koch had shipped approximately 25.6 million gallons of fuel oil into Rhode Island over the course of three years. Given the frequency of Koch's sales in Rhode Island and the amount of fuel oil shipped into Rhode Island. Koch's claim that it did not benefit from the services provided by Rhode Island is without merit. Accordingly we believe that the District Court correctly concluded that the gross-earnings tax is fairly related to the services received by Koch.

In light of the foregoing, we are of the opinion that the tax imposed by the Gross-Earnings Tax Act is consistent with the commerce clause. The tax at issue is applied

to an activity with a substantial nexus with Rhode Island, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services which Rhode Island provides to Koch. We therefore reject Koch's contentions that the District Court erred in its analysis under the commerce clause.

Koch also asserts that the District Court erred in determining that it was an "importer" under the language of the Gross-Earnings Tax Act. Koch argues that an importer is the person to whom the goods are sent. Since the goods in the instant case were sent to Narragansett, Koch argues, Narragansett was the importer of fuel oil into Rhode Island. We are not persuaded by Koch's contentions.

It is well-settled doctrine that when a statute is clear and free from ambiguity, it is the obligation of this court to give effect to its clearly expressed intent. *Gilbane Co. v. Poulas,* 576 A.2d 1195, 1196 (R.I. 1990). In such circumstances we must accord the words of the statute their literal and plain meaning. *Marran v. Baird,* 635 A.2d 1174, 1180 (R.I. 1994); *City of Warwick v. Aptt,* 497 A.2d 721, 724 (R.I. 1985).

The language of § 44-41-1 is clear and unequivocal. It unambiguously states that a "petroleum company" means "every corporation formed for or engaged in the business of importing or causing to be imported by a person other than a [petroleum] corporation subject to tax under this section into this state for sale in this state, extracting, producing, refining, manufacturing or compounding petroleum." Pursuant to the tax administrator's regulations under the Gross-Earnings Tax Act, "an

entity is engaged in the business of importing petroleum in Rhode Island if it owns petroleum located outside Rhode Island and ships it or causes it to be shipped to a point within Rhode Island for sale in Rhode Island." *Emergency Rules, Re: Gross Earnings Tax of Petroleum Companies,* Rule II (Oct. 18, 1992). The plain meaning of the term "importer" is a "[p]erson who brings (i.e., imports) goods into [a] country from [a] foreign country." Black's Law Dictionary, 755 (6th ed. 1990). Clearly under this definition Koch is the party bringing the product from another state into Rhode Island.

As the District Court correctly indicated, Koch caused the oil to be imported into Rhode Island. Through its own actions Koch conducted the negotiations which resulted in the fuel-oil sales' consummation in Rhode Island. Additionally, because Koch held title, risk of loss, and possession of the fuel oil up until the time the fuel oil passed the flange in Providence, it clearly possessed the fuel oil at the time it was "brought" into the state. Accordingly, we believe that the District Court correctly determined that Koch was an importer within the meaning of the Gross-Earnings Tax Act. We therefore reject Koch's contentions that Narragansett was the importer in the instant case.

For the reasons stated herein, the petition for certiorari is denied and the writ heretofore issued is quashed. The judgment of the District Court is affirmed, and the papers of the case may be remanded to the District Court with our decision endorsed thereon.

Justice Flanders did not participate.